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Supreme Court of the United States

OCTOBER TERM, 1904.

THE UNITED STATES OF AMERICA,
Appellant,

vs.

Chicago, Milwaukee & St. Paul Railway Company, The Southern Minnesota Railway Company, Michael Donovan, Thomas S. Thompson, O. C. Erichsrud, Anna Erichsrud, Addie J. Erichsrud, Mabel H. Anderson nee Erichsrud, Julia P. Remington, nee Erichsrud, and Louis K. Woodwick,
Defendants.

54

Appeal from U. S. C. C. A., Eighth Circuit.

Brief of Defendants Erichsrud, Anderson, Remington and Woodwick, Appellees.

ANDREW C. DUNN,
Attorney for Appellees Erichsrud, Anderson, Remington and Woodwick.

INDEX OF BRIEF OF APPELLES ERICSHRUD'S AND WOODWICK.

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Defendants.

Brief in behalf of defendants, appellees, Anna Erichsrud, Addie J. Erichsrud, Mabel H. Anderson *nee* Erichsrud, Julia P. Remington *nee* Erichsrud and Louis K. Woodwick.

This action involves the east half of the north-west quarter of section 35, in town 101, north of range No. 28, west, situate in the County of Faribault and State of Minnesota, and comes here on appeal by the United States from the decree of the Circuit Court of appeals Eighth Circuit, affirming the decree of the Circuit Court, United States District of Minnesota, dismissing the bill on its merits.

The United States proceeds as it alleges in its bill of complaint under the provisions of the Act of Congress approved March 3rd, 1887, relating to the adjustment of railroad grants, to have declared null and void and to set aside the certification of the land in question made on the 25th day of March, 1871, under the provisions of the act of July 4th, 1866, granting lands to the State of Minnesota for the purpose of aiding in building a railroad therein, and also all conveyances made since the said certificate, of record or otherwise, basing its claim upon the allegation that said certification was erroneous and void, because it was not embraced within the grant, and that there was a prior subsisting right in one Michael Donovan attached to the said land before its certification, which right was ignored by the Land Department erroneously. R. econ. p. 17.

The assignments of error are so general in scope — attacking and challenging the decree of the Circuit Court of Appeals in dismissing the bill from every conceivable position—alleging errors affirmative—and negative—that justice cannot be done in support and defence of the decree appealed from, otherwise than by an argument and brief covering the case somewhat in detail, as if no former adjudication had been had—this seems to me to be a necessity of the situation.

RECORD HISTORY OF THE INVOLVED LAND.

The record history of the land involved is:

1st. It is within the indemnity limits of the granting act of July 4th, 1866, being within 20 miles of the line of the railroad for whose benefit the grant was made. R. p 113. Stip. facts 111.

2nd. It, with all the lands in said limits was, by order of the Gen. Land Office, *withdrawn* from sale by order made on the 24th day of August, 1866, which order was received by the local land office at Winnebago City,

Minnesota, and became effective September 10th, 1866. See Record p. 118. Govt. Ex. "B". 10 Amended Bill.

3rd. It was certified by the United States to the State of Minnesota as a part of the lands granted under the act of July 4th, 1866, for the benefit of the Southern Minnesota Railroad Company, March 25, 1871. R. 114. Stip. facts, VI.

4th. It was conveyed by the State of Minnesota pursuant to said act by deed August 8th, 1871, to the Southern Minnesota *Railroad* Company. R. 114. Stip. facts, VI.

5th. It was sold under foreclosure proceedings in the Circuit Court of the U. S. District of Minnesota, foreclosing a mortgage made thereon by the Southern Minnesota *Railroad* Company, in February, 1877, to A. P. Mann & H. H. Camman in trust for certain creditors of said company. R. 114. Stip. facts VII.

6th. It was conveyed by said purchasers, Mann & Camman, on the 3rd day of March, 1877, to the Southern Minnesota *Railway* Company, a corporation formed under the General Laws of the State of Minnesota. R. 114. Stip. facts, VII. Abstract of Title. R. 178, item 14.

7th. It was contracted to be sold by the Southern Minnesota Railway Company to one Boysen; by him assigned to one Fredricksen, by him assigned to one Thompson, and by said Thompson assigned to defendant O. C. Erishrud. See R. Bill of Complt. p. 4, it. 15. p. 115 Stip. facts, IX.

8th. It was conveyed by the Southern Minnesota *Railway* Company, to O. C. Erichsrud March 20th, 1888. R. 115. Stip. facts IX.

9th. It was decreed by the Probate Court of Faribault County, Minnesota to the defendants, Anna Erichsrud, Addie J. Erichsrud, Mabel Anderson and Julia P. Remington, heirs of O. C. Erichsrud, deceased, Nov. 6th, 1888. R. 178, Dfs. Ex. 5.

10th. It was conveyed by Anna Erichsrud, Addie J. Erichsrud, Mabel H. Erich-

srud, and Julia Erichsrud, heirs of O. C. Erichsrud, deceased, to the defendant Woodwick, May 24th, 1889, (R. 169,) Dfs. Ex. 1., in whom now rests legal title.

THE ACT OF MARCH 3rd. 1887.

The first section of the act of March 3, 1887, under which the plaintiff claims to proceed herein, directs the Secretary of the Interior to immediately *adjust*, in accordance withthe decisions of the Supreme Court, each of the Railroad Land Grants made by Congress to aid in the construction of railroads, *and not heretofore adjusted*.

The question arises what is meant by the term adjust. Ordinarily the term would signify a regulation of the same and an orderly disposition thereof, according to law, and it seems that in the adjustment of the Land Grant involved in this action that the same *was adjusted* over 30 years ago when the Secretary with all the light he had and could find, *adjusted* this particular Land Grant as to this piece of land and certified to the State of Minnesota, the land involved herein, and declared the same to be the property of the State for the benefit of the railroad; which the State by its Legislation had designated, which was the Southern Minnesota *Railroad* Company, and which company had earned it by building the railroad.

If Congress has power to cause *land titles acquired* under the laws as interpreted by and the rules and regulations of, the Land Department of this Government to be ripped up, and *re-adjusted* every time the Court shall change its views upon a given subject or make a decision on some point concerning the same, then there would seem to be no repose and quiet to the titles obtained thereby.

The extent of the mischief and injury to private rights acquired, relying upon the integrity of the action of the Land Department in *adjustments heretofore* made of the public domain according to the granting acts of Congress which would inevitably result in the application sought to be made of that act to this case is well nigh

inconceivable. No man could hope to read his title clear, if such a flaming sword is always to be held aloft to destroy it.

In this connection I would ask the attention of the Court to that part of the answer of the defendant companies found on pages 23 (bottom) 24-25 (top) of the printed record being the views of the late Mr. John W. Carey, Solicitor of the defendant companies, upon this proposition, as a novelty; and make the same a part of this brief without reprinting same.

It is submitted that the Land Grant involved is *not one of those NOT heretofore adjusted.*

The second section of the act makes it the duty of the Secretary of the Interior in certain cases (of which this is claimed to be one) to demand of the railroad company for whose benefit the lands were certified or patented, a reconveyance of the same or a relinquishment of its right thereto to the U. S., and in the event of the refusal for the period of 90 days, then such legal action is to be taken as shall be warranted, under the facts of each case, to restore said title to the United States and to the public domain.

Now it is seen that this particular piece of land was certified to the State of Minnesota for the benefit of the Southern Minnesota *Railroad* Company, and that such company was the beneficiary under the said granting act. I ask attention to the distinction between the *Railroad* Company and *Railway* Company, they being separate organizations

A demand of re-conveyance and relinquishment was therefore a *condition precedent* to be performed before an action could be maintained *under the statute,* to cancel the certification.

There is no showing that any demand was ever made upon the Southern Minnesota *Railroad* Company, the only company on which demand would be pertinent, to restore this land, or reconvey it to the Government of the United States as required by the act, as a *condition* precedent to legal proceedings.

The said company is not made a party to this action.

A demand and refusal was pleaded and proved as to the Chicago, Milwaukee & St. Paul Railway Company, and no other company or person, evidently going upon the mistake of the pleader that the Chicago, Milwaukee & St. Paul Railway Company was the legal successor of the Southern Minnesota *Railroad* Company, but that claim is expressly denied in the answer of the defendants, is not supported by any proof, *and is not true.*

Appellant in view of this lack of notice seeks to parry its force by now claiming this action to be one brought for the purpose of removing a cloud from a title so as to convey it to defendant Donovan, whom it conceives itself in duty bound to protect.

But this action is not brought for that purpose. It is expressly alleged in the Bill R. p. 7, sec. 22, that it is brought under the provisions of the Act of March 2, 1887, and in order to carry out the mandate of Congress expressed in said act.

THE WITHDRAWAL OF THE LAND FROM SALE.

It will be seen from the history of the land as above stated, that the Secretary of the Interior, on the 23rd of August, 1866, by order to the local land office, withdrew from market the lands embraced within the provisions of the Land Grant act of July 4, 1866, including the tract in question. See R. 118, communication from the G. L. O.,, to the Secretary of the Interior.

This order of withdrawal was received at the local land office at Winnebago City, the district in which the land was situated, Sept. 10th, 1866. R. 119. R. 10 Amended Complaint.

We claim that as the land department was *at that time* administering the land laws, such withdrayal operated at once to prevent any initiation of a homestead entry on this land, and was effectual to prevent Donovan

from acquiring any right in this land after that withdrawal, which was over a year *prior* to his claim of settlement in 1867, and nearly two years *prior* to his claim of application to enter in 1868. See admission of the plaintiff found in R. 150-1-2. See Spencer vs. McDougal, 169 U. S., 62. (L. C. P. Co., Ed. 40 p. 76) where it is held.

> "That an order of the land department withdraw-
> "ing from sale lands in a certain district in which
> "lands have been granted for a railroad *not yet*
> *"located* is sufficient to defeat a subsequent pre-
> "emption of land withdrawn, although *more land*
> *"was withdrawn than was necessary."*

Also Hamblin vs. Western Land Co., 147 U. S., 531, L. C. P. Co., Ed. 37, 267, where it is held

> "That the location of the line of Railroad accepted
> "by the Land Department and the reservation of
> "the land in question from sale to satisfy the
> "grant to the Railroad, operated to withdraw the
> "land from entry of pre-emption or homestead
> "laws, and this whether the location was valid or
> "not it being accepted by the Land Department
> "and the withdrawal made accordingly."

Walcott vs. Des Moines R. & N. Co., 72, U. S. 5, Wall 681 (L. C. P. Co., 18, 689) in which the Court in speaking of the duty of the L. D., to reserve from sale the land embraced in the grant says:

> "The grant carried with it by necessary implica-
> "tion not only the power but the duty of the Land
> "Department to reserve from sale the lands em-
> "braced in grant, otherwise its object might be ut-
> "terly defeated and upon such notice it became
> "the duty of the land officials to withhold the sales
> " and reserve them to the United States."

In Wood vs. Beach, 156 U. S. 548 (L. C. P. Co., Ed. 39, 528) it is held, Sylabus:

> "Where public land has been withdrawn from sale
> "or location, pre-emption or homestead entries, no
> "rights, legal or equitable, can be acquired by oc-

"cupation or settlement thereon as against a rail-
"road company for whose benefit the withdrawal
"was made which subsequently complies with all
"the conditions of title and receives the deed there-
"for."

In the case at bar, the grant was made July 4th, 1866, and the Land Department ordered the withdrawal of the lands in both places, and the indemnity limits, on the 23rd day of August, 1866, which became binding on the local officers at time of their receipt of same, Sept. 10th, 1866. It is to be presumed that the Railroad Company had made its survey and filed its plat prior to the withdrawal of the lands, but even had that not been the case it would not affect the legal effect of the order of withdrawal.

It is difficult then, if the withdrawal had the effect claimed in the decisions cited, to see how the defendant Donovan could subsequently legally initiate an entry of the land under the Homestead Law or to have his application to enter, made when he claims to have done so.

BARCLAY ENTRY.

Donovan's application to enter is claimed to date from June 6th, 1868, and it is also claimed by the plaintiff that because of the prior entry of Barclay the order of withdrawal did not effect this particular piece of land, but it is claimed by the defendants that *order, as made and understood by the land officers,* was to reserve all the odd section land within the territory in which is situated this tract, as being *embraced within the grant,* and that such information was conveyed to Donovan on the 6th of June, 1868, when it is claimed that his application was made. R. p. 50, (top) Ev. Bullis.

At that time in the administration of the Land Department of the Government it seems that all odd sections within the granted limits, both place and indemnity, were

treated as belonging to the grant, even if encumbered with Homestead entries; if such entries should thereafter at any time prove to have been fraudulent, or should prove to have been abandoned by the entryman, and therefor cancelled, and as soon as such abandonment, or fraud, was shown to exist, and the cancellation made, the same at once attached to the grant as if such entry had never existed. So that the order of withdrawal effected this tract, provided the Barclay entry should prove fraudulent or abandoned, and the Southern Minnesota *Railroad* Company, for whose benefit the grant was made, should be and was considered at all times, from the date of the land grant, July 4th, 1866, a *legal applicant* for all lands which might be found available under the grant, but to be held in abeyance as to actual title, until the same should be earned under the terms of the grant and the legal title conveyed to it.

So, it is claimed by these defendants that the moment the homestead entry of Barclay was cancelled it became at once attached to and part of the granted lands under the *then administrative interpretation* of the land grant act, as if said entry had in fact never existed.

This view was taken by the Secretary of the Interior in certifying this tract to the State after the selection by the R. R. Co., as a part of the *granted lands*, notwithstanding the former entry of Barclay.

Under no other construction of the Land Grant act, could the rights of the company be protected within the indemnity belt—and Company acquire any lands therein that might have been cancelled for fraud or abandonment between the date of the act and the building of the road—otherwise the road might have earned the land, only to find others in possession after such earning.

It seems to me upon principle that the true construction of the Land Grant Act gives the Company the prior right of selection—in the indemnity belt, and that no disposition could be made of the odd sections therein, until it was determined that the company would not require them in lieu of lands lost—or that it was not en-

titled to them because of failure to earn them. Such was the ruling until the Dunmyer case, 113 U. S. 629, was decided. See Record p. 186.

W. St. P. Ry. Co. v. W. So. 165 U. S. 465-6.

I am not unmindful that in recent cases Nelson v. Co. 188 U. S., 108, L. Ed. 47-406. Oregon Co. vs. U. S. 189 U. S. 103 L. Ed., 47-727.

This court has held that withdrawals in indemnity limits in certain cases were without authority of law and actual settlers within those limits are not affected by such withdrawals—but in all of these cases it seems to me that the claims of the settlers were far different in status than the claim made here and in none of those cases does the question of subsequent grantees equity appear—hence those cases are seemingly inapplicable.

DONOVAN'S APPLICATION TO ENTER.

The proof fails to show that any *written or legal* application to enter this land was in fact made by Donovan on the 6th day of June, 1868, or at any time prior to date of the selection by the company, Nov. 29th, 1870.

The only attempt at an application to enter was made at a time when the land was *not subject to be entered by Donovan* because it was then covered by the entry of Barclay.

(See evidence of Bullis R. 48.) Mr. Bullis testifies that at the date of the trial initiated for the purpose of invesigating Barclay's entry, Donovan signed a paper which he, Bullis, called an application, but which bore no date, and which was made merely for the purpose of *heading off* any other applicants who might, between the date of the trial and before the return of the Land Department could be received cancelling the Barclay entry (if received,) apply to enter the land; but he further testifies R. 56-7 that the paper was destroyed and was *considered no application at all.* THAT IT WAS CON-

SIDERED *as useless and had fulfilled its function and was of no avail whatever, was thrown on floor, and that such papers were always destroyed.* This it seems was done in June, 1868, at a time when the land was *open for entry* only as to the eighty on 26, and as to the eighty in 35, he testifies that *according to our instructions from the Land Department the same was not open for entry because of its reservation under the Land Grant Act.* And he further testifies that after the said so-called application had been destroyed, Donovan then made an application for the eighty in 26 and took that. R. 59.

It would therefore seem from this testimony of the then Register of the Land Office that there was in fact *no application presented to the Land Officers* for their consideration, for this tract of land by Donovan at any time, when the same was subject to be taken, and in fact no application at any other time. Therefore there could have been no *rejection and no decision thereupon.*. Mr. Bullis further testifies that there was *no record* made of this application so-called, and nothing was ever done with it. The whole matter was wiped out dead, and was *not considered as having been an application at all.*

The Counsel for appellant however, seems to consider that the question of Donovan's application to enter this land on the 6th of June, 1868, is settled in his favor by the remark of the learned Judge of the Circuit Court, in his oral opinion herein. R. p. 203.

It does not seem to me that the Court was there deciding that a legal application was then made by Donovan —but merely voicing the claim of Donovan—whereas there is absolutely no evidence in the record that any application to enter this tract was made in June, 1868. There was some desultory talk between him—and Bullis—but no application to enter this land under any rules of the Land Office was made or offered to be made—at that time, or any other time—and the learned Judge did not intend to dignify that talk with the title of legality, as an application to enter and acquire lands. *No record* exists of it, the oral statement of the parties who engaged in

it, is its sole monument, and the accumulated dust of over a third of a century has rendered its ever having existed exceedingly doubtful if not entirely visionary.

DONOVAN'S CLAIM OF SETTLEMENT AND CULTIVATION.

It is conceded by plaintiff that unless this so-called application was followed by Donovan's actual occupancy or cultivation for the necessary period of five years, that it would not avail, and hence the proof offered to support such settlement. It will be remembered that this tract in 35 and the tract in 26 is claimed to be treated by the plaintiff as one tract, and in considering the proof such fact should be borne in mind.

It is submitted that the proof falls far short of establishing, at this distance of time, that any setlement or cultivation was had after the entry in section 26, in June, 1868, or even prior thereto, *which could be attributed to the carrying into effect of said claimed application for a homestead entry on section 35.*

.. There is no question but that Donovan was aware when he filed his application and entered the eighty in 26, that the eighty in 35, the involved tract, was what was called Railroad Land, i. e. embraced within the granted limits of the Act of July, 1866, and reserved to the Southern Minnesota *Railroad* Company. He was aware of this because he was so informed by Mr. Bullis, the Register of the Land Office. He thereupon *withdrew* and *abandoned his so-called application* for the *whole* of the land embraced in the Barclay entry, and it was then destroyed (*see R. 56-57, Evidence Bullis*) and made an application for and entered the eighty on 26.

The evidence fairly shows that he was aware of the withdrawal when he first visited the Land Office in 1867, and ordered the trial because it appears in evidence that the lands embraced in the grant including this involved

tract, were *actually withdrawn* from market, and the local land officers received such withdrawal instructions on Sept. 20, 1866. *See R. 118; also R. 10, Complaint as amended.*

Now, if the local officers of the Land Office at Winnebago City, had been thus instructed, it is a fair and lawful presumption of fact that they did their duty in the premises by so informing Donovan.

But the fact is apparent that this land was *actually withdrawn* at that time, and Donovan must have been made aware of it when he first appeared and ordered the trial to test Barclay's right. *His so-called application is not in evidence. It was destroyed by his knowledge and consent, and no record of any kind was ever made of it.*

As soon as the trial took place, some time in 1867, Mr. Donovan commenced his improvements on the eighty in 26, by building a house upon it, ignoring entirely the eighty in 35, because he knew that that was then Railroad Land, and upon which tract (35) Barclay had initiated his improvements, having broken an half acre and drawn upon it materials for a house.

It is in evidence (See evidence of Silliman R. 150, (top,) Woodwick R. 156-7.) that it was the custom among the settlers at that early day, in that part of the country, to use the vacant R. R. lands in their midst for pasturing, making hay and cultivation, until they were sold to individuals, when they would surrender it to the purchaser. Donovan's improvements and cultivation upon 35, was evidently of the same character, getting what benefit he could from the land without title, paying no taxes—a mere trespasser upon the same and nothing more.

This is apparent from the evidence of Donovan himself on page 70 when in answer to question by Mr. Gilman: "When did you cease to occupy it after that?" referring to the Thompson purchase, the witness answered, "*Mr. Thompson bought the land and of course I was dispossessed and had to give it up, and he took possession*" —Following exactly the custom as detailed by witnesses Silliman and Woodwick.

This view is strengthened by the fact that we find Donovan, in 1883, applying to the Land Department to enter this tract as an additional homestead, under the act of March, 1879, claiming *it to be public lands. See R. 191.* This claim is clearly inconsistent with the claim made here that he should be considered as the owner under the so-called application of June, 1868.

This view is further strengthened by the admitted fact that in 1885 he commenced a suit against the defendant, Thompson, in the District Court of Faribault county, to eject him from the land, after its purchase by Thompson; basing his claim to the land upon the Statute of Minnesota, *General Statute 1894, Chapter 85,* in which action he claims this land *to be public lands of the United States. See his complt. in suit vs. Thompson, p. 180-181. R. Ex. "6,"* thus totally ignoring any claim of erroneous ruling of the Land Office in rejecting his claim as a homestead, or any claim of ownership; a claim very inconsistent with the claim made here.

LACHES ESTOPPEL AND RES JUDICATA.

In this action the Court should administer the equities existing between the defendant, Donovan, and the other defendants, and not permit the United States to shield itself behind its mantle of Sovereignty for the purpose of maintaining an action, which could not otherwise be heard.

This action, although brought nominally in the name of the United States, and ostensibly for the purpose of executing the mandate of Congress found in the act of March 3rd, 1887, is in truth and fact an action brought by the defendant Donovan for his sole benefit to redress a fancied wrong, an action which he could not now maintain by reason of the application of the Law of Estoppel and Res Judicata, and Laches.

In such cases it seems to be settled that the Courts will administer the equities existing between *the real litigants before it* ignoring the attitude and sovereign character of the nominal plaintiff.

In the case of the United States vs. Beebe, 127 U. S., 338, L. P. Co., Ed. 32, 121 ,it was held, 2nd Sylabus:

> *"In case where the Government, although a nom-*
> *"inal plaintiff, has no real interest in the litiga-*
> *"tion, but has allowed its name to be used therein*
> *"for the sole benefit of a private person, the de-*
> *"fences of Laches and the Statutes of Limitations*
> *"are available, the same as in suits between private*
> *"individuals."*

In the opinion itself we find this holding:

> "The principle that the United States are not
> "bound by any Statute of Limitations nor barred
> "by any laches of their officers, however, gross, in
> "the suit brought by them as a Sovereign Govern-
> "ment, to enforce a public right or assert a public
> "interest, is established past all controversy or
> "doubt. But this case stands upon a different foot-
> "ing, and presents a different question; the ques-
> "tion is: Are these defences available to a defend-
> "ant in a case where the Government, though a
> "nominal complainant party, has no real interest
> "in the litigation, but has allowed its name to be
> "used therein for the sole benefit of a private
> "person? It has not been unusual for this Court,
> "for the purpose of Justice, to determine the real
> "parties to a suit, by reference not merely to the
> "names in which it is brought, but to the facts of
> "the case as they appear on the record."

Citing and approving the language of the Court in a former case, to-wit: New Hampshire and New York vs. Louisiana 108, U. S., 76 (27, L. P. Co. Ed. 656.)

In which case the Court looked behind and through the nominal parties on the record, and then said:

> "No one can look at the pleadings and testimony
> "in these cases without being satisfied beyond all

"doubt that they were in legal effect commenced "and are now prosecuted solely by the owners of "the bonds and coupons."

Proceeding them in the principal case cited, the Court says, deciding the question as follows:

"We are of the opinion that when the Government "is a mere formal complainant in a suit, not for "the purpose of asserting any public right, or pro- "tecting any public interest, title, or property, but "merely to form a conduit through which one pri- "vate person can conduct litigation against another "private person, a Court of Equity will not be re- "strained from administering the equities existing "between the real parties, by any exemption of the "Government, designed for the protection of the "United States alone.

"The mere use of its name in a suit for the ben- "efit of a pivaate suitor, cannot extend its immun- "ity as a Sovereign Government to said private "suitor, whereby he can avoid and escape the scru- "tiny of a Court of Equity into the matters pleaded "against him by the other party, nor stop the Court "from examining into and deciding the case ac- "cording to the principles governing Courts of "Equity in like cases between private litigants. "These principles, so far as they relate to general "Statutes of Limitations, the laches of a party, and "the lapse of time, have been rendered familiar "to the legal mind by the oft-repeated enunciation "and enforcement of them in the decisions of this "Court.

"According to these decisions Courts of Equity "recognize and give effect to the General Statutes "of Limitations as a defence to an equitable right, "when at law it would have been properly pleaded "as a bar to a legal right. They refuse to inter- "fere and give relief when there has been gross "negligence in prosecuting a claim, or where the "*lapse of time* has been so long as to afford a clear

"presumption that the witnesses to the original "transaction are dead, and the other means of "proof have disappeared."

In the more recent case of Moran vs. Horsky 178, U. S. p. 213, op-L. Ed., 44, p. 1041 the doctrine cited from U. S. vs. Beebe (supra) is fully considered approved, and applied in its fullness, to-wit:

At p. 213 (middle) "But it is well settled that when the Government proceeds to set aside its patent not for the sake of establishing its right, to the property but in the interest of some person who has an equitable claim thereto, or to whom the Government owes the duty of protecting his interests it is subjected to the same defence of Laches, Limitations and want of Equity that would attach to a like suit by an individual."

In the case of U. S. vs. Beebe, cited supra, one of the earmarks whereby the Court in that case determined the question as to who the real litigant was, was because it appeared that the attorneys for the petitioners other than the U. S. Attorney, were, by agreement, permitted to handle the case for the U. S. The Court considered that fact as strong evidence that the U. S. was a mere figurehead.

In this case there is a singular similarity. The special counsel for the Government, Mr. Gilman, who handled the case entirely in its trial for the plaintiff, appears as the attorney for the defendant Donovan, puts in his answer for him, years after his right to do so had expired, which admits the whole case of the Government against the defendants, himself included, and very humbly prays:

"*That the decree may be granted as prayed for in* "*in the bill in this action, and that the conveyance* "*of said tract of land to the said Louis K. Wood-*"*wick be cancelled null and void and held for* "*naught.*". See R. 34-39. The brief for the appel-"lant also furnishes strong evidence of having been "collaborated by the special attorney for the plain-"tiff and the solicitor for defendant Donovan."

Good evidence that the action is one solely in the interest of defendant Donovan.

The U. S. has no real interest in this litigation. No public right is to be asserted; no public property is to be preserved; no public duty is to be performed.

U. S. vs, San Jacinto Tin Co., 125 U. S. 293. L. C. P. Co., Ed. 31, 751-2.

Now upon the whole record and facts of this case *it falls directly* into the class of cases instanced by the Court in which the equities of the real parties litigant will be administered.

Donovan is the *real plaintiff* herein, and these defendants, especially the defendant *Woodwick*, the holder of the legal title, is the *real defendant*.

If therefore he (Donovan) is estopped either by reason of laches, or conduct, or otherwise, on his part or by the Statute of Limitations of Minnesota, or by the application of the doctrine of Res Judicata. Then this Court will apply here the rule of the U. S. vs. Beebe, and Moran vs. Horsky above quoted, against the complainant, the U. S.

THIS ACTION IS STALE.

It was commenced against the defendants, Railway Companies, Thompson and O. C. Eichsrud (by name only) in the year 1893, *twenty-two years after the certification*. No service was had upon any defendants ,except the two Railway Companies, until the year 1901, when the defendants, Anna Erichsrud, Addie J. Erichsrud, Mabel H. Andersen *nee* Erichsrud, Julia P. Remington *nee* Erichsrud, as heirs at law of the deceased O. C. Erichsrud, and Louis K. Woodwick, were impleaded as defendants, under a supplemental bill of complaint, filed March 4th, 1901, *thirty years after the certification, thirty-three years* after the claimed rejected Homestead entry, and upon *them* the service was made of the subpoena herein a few days only prior to the expiration of the Statutory period in which

this action could be commenced against them under the act of March 2, 1896, as to each of *them* the action was only *then* commenced.

Donovan, according to his own confession and admission, gave up his pretended possession of this land to Mr. Thompson in the year 1885, R 70, (bottom) 83. Thompson and the other defendants have been in the actual peaceable possession ever since, or more than fifteen years prior to the commencement of this action, as against Woodwick and the heirs of O. C. Erichsrud.

By the Minnesota Statute limiting the right to bring actions for the recovery of real estate to a period of 15 years from the last possession of the plaintiff, or his ancestors or grantors. Donovan is and would be barred from prosecuting an action for the recovery of this land in his own name. Gen. Stat. Minn., 1894, S. 5134.

By Section 5136, subdivision sixth, it is provided:

"Actions for relief on the ground of fraud" must be commenced within six years from the discovery of the fraud.

This statute is held to apply to an action to set aside and cancel a deed on account of fraud or to recover the property conveyed.

St. Paul S. T. E. R'y. Co. vs. Sage, 44 Fed. Rep. (per Shiras J.) 315.

It is claimed that Donovan, under the proofs herein, would be barred by sections 5134-5136 supra, from bringing any action to obtain the title to this land himself. And if so why not the U. S.

In U. S. vs. San Jacinto Tin Co., 125 U. S. 273. (An action to set aside a patent for fraud) this Court speaking through the late Mr. Justice Miller, says: *"If the doctrine that the U. S. in bringing such actions is not controlled by any statute of limitations or governed by the rule concerning laches be sound *** then the evil which may result would seem to be endless as well as enormous."* This query has been answered and ripened by the later cases of U. S. vs. Beebe and Moran vs. Horsky, cited *supra.*

RES. JUDICATA.

It is also claimed for these defendants that Donovan's claim for this land and to cancel the certificate, is as to him RES JUDICATA, and he is estopped for that reason.

By reference to the action brought by him in the District Court of Faribault County (R. 180-186,) it will be seen that that action was one to determine adverse claims to public lands of the U. S., and to recover its possession under the provisions of Chapter 85 G. S. Minn., 1894, the Complaint expressly alleges the land to be *public lands of the U .S.*, upon which the plaintiff was settled as a settler on public land, and alleges that the defendant, Thompson has taken unlawful possession of the same, and asks judgment for possession and damages.

The defendant Thompson answered and alleged his title thereto as being derived through the *certification thereof from the Government of the U. S. to the State of Minnesota and the further conveyance from the State to the Southern Minnesota Railroad Company*, and by other conveyances to himself. See R. 181.

The reply of the plaintiff Donovan put in issue the *legality of the certification by the U. S. to the State. R. 289-800.* It will thus be seen that the same issues involved in this action were involved in that, to-wit: The erroneous certification of this tract of land.

That action was duly tried on all the issues and resulted in a judgment against Donovan on the issues and merits thereof. See R. 185. 116 Stip. facts XIV.

Donovan selected his forum, and must be concluded by its decision. He rested content with that judgment, and still so rests, and it would seem that that judgment is a complete bar to his further prosecuting any action in any form either in his own name or in the name of the U. S. for his benefit, to test the validity of the acts of the Secretary of the Interior in certifying the land in question to the State under the provisions of the act of July 4th, 1866.

Hence it is claimed that inasmuch as Donovan is estopped both by the Statute of Limitations, as well as

the judgment aforesaid, the Government of the U. S. ought not to lend its aid, name and power, and shield itself behind its Sovereignity to aid him in opening and further litigating this once *determined question.*

Every consideration of *equity, fair dealing and honor* demand that the United States should not under these circumstances be permitted to maintain this action, but that this Court should administer in this action the law as well as the equities existing between Donovan and these defendants in respect to the land involved.

And upon this ground also the decree appealed from should be affirmed.

PURCHASERS IN GOOD FAITH.—THE ACT OF MARCH 2, 1896.

The defendants, the Southern Minnesota Railway Co. Erichsrud and Woodwick, the only defendants served, were *purchasers in good faith*, and as such the title conveyed by the Government through the Land Grant act of July 4th, 1866, and the certification of the State and by mesne conveyances to them, are confirmed under the provisions of the act of March 2nd, 1896, which provides in terms in the first section thereof as follows:

> *"But no patent to any land held by a bona fide pur-*
> *"chaser shall be vacated or annulled, but the right*
> *"and title of such purchaser is hereby confirmed."*

The holder of the legal title now is the defendant Woodwick, and if there ever was a purchaser of land in good faith, he has shown himself to be such in this instance.

The language of this Statute of repose is unlimited as to the purchaser. It would be sufficient if he purchased the land from any one in the chain of owners, from the Government down, if his purchase was made in good faith, for value, without notice of other conflicting claims or demands.

All of the essentials to a purchaser in good faith appears in the evidence. He himself testifies that he purchased this land from the heirs of O. C. Erichsrud, the other defendants herein, paying two thousand dollars in cash for it, in this he is corroborated by witness Anna Erichsrud, and her selling agent, F. P. Brown, without notice of any defect in the title, or claim by any person; that he was furnished with an abstract of title of the same by the selling agents of the Erichsruds, the witness F. P. Brown, which abstract is in evidence, page 173 of the Record that he relied in making such purchase upon the recitals therein, and upon the fact of the certification thereof by the Government of the U. S. to the State, and by the conveyance by the State to the Southern Minnesota *Railroad* Company. R. 154.

The abstract (R. 173) is complete, showing the claim of title from the Government down to the defendant, Woodwick, disclosing a clear title in fee to the premises in defendant Woodwick, as well as to all of the prior owners, including the deceased defendant, O. C. Erichsrud. The other muniments of the title, the deed of O. C. Erichsrud, the probate decree, and the conveyance to Woodwick from the heirs, are in evidence and show such a title as is unassailable in law or equity upon the record.

The case of U. S. vs. W. St. P. R'y. Co., 165 U. S. 480, L. C. P. Co., 41-79, is apparently decisive as to the matter of good faith in these defendants. Upon the undisputed evidence they are each of them from the Southern Minnesota Railroad Company down to and including Woodwick, within the rules and interpretations of this Statute of 1896, as declared by Judge Brewer in that case. Says the Court:

> "It matters not what *constructive* notice may be "chargeable to such a purchaser if in actual ignor- "ance of any defect in any Railroad title, and in "reliance upon actions of the Government in the "apparent transfer of title by certificate or patent, "he has made an honest purchase of the land."

When this land was certified by the Government to the State there was an absolutely clean record behind it, it was public land in the *statutory sense of the term, and free from any individual or any other claims.* The homestead entry of Barclay had been cancelled for abandonment since January, 1868. See Stipulation R. 114, IV. Also see defendant's Ex. "A," page 187, R., being a certified copy of the Plat Book of the U. S. L. O. at Washington. See also Certificate Register and Receiver of the Land Office at Jackson, page 191-192 R., where they certify *that there is no Homestead, pre-emption, State or valid claims to any portion of any of the lands certified on file or record in their office.*

And by the records of land titles in the office of the Register of Deeds in Faribault County, upon which defendants purchasers had a right to rely, there was no intimation or evidence of any claim or title by any person other than the grantee of the State, to-wit, the Southern Minnesota *Railroad* Company, and its grantees, including this defendant Woodwick, the present holder of the title; neither was there any notice of the pendency of this action filed or recorded in the office of the Register of Deeds of Faribault County, as required by the Statute of the State of Minnesota, in order to give intended purchasers notice of claimed defects in the title of the land involved herein. *G. S. Minn. 1894, S. 5866.*

Woodwick had a right, as he testifies he did, to rely upon the *apparent transfer of title by the Government by its certificate to the Southern Minnesota Railroad Company* and the subsequent transfers by said Company and its grantees. R. 153-154.

But I do not understand that Appellant challenges the good faith of the defendants in the purchase of this land by reason of any constructive notice to them, or either of them, but it does challenge the same upon the ground that the claimed visible possession by Donovan of the land was sufficient notice to them of his rights, and that therefore they cannot be held to be purchasers in good faith.

Further Appellant claimed in the court below and may here that because the answer of defendants Railway Companies—admits and alleges upon information and belief that the defendant O. C. Erichsrud (who is not served herein) took the assignment of the Thompson contract as a collateral security for money loaned by him to Thompson, R. p. 20-21, that neither he nor his grantees are to be protected as purchasers in good faith under the act of March 2nd, 1896, or otherwise.

But the answer of the defendants Woodwick and the heirs of Erichsrud, deceased, expressly deny the allegation in the bill, R. p. 4, item 15, charging that Erichsrud so took the title to the land—and refuse to adopt that admission in their answer expressly. *See answer of defendants Erichsrud and Woodwick R. 41 and R. p. 43, and* alleges that the purchases of Erichsrud and Woodwick were *bona-fide,* and not upon any trust; or as security—the proof of that proposition amply sustains their contention.

It is absurd to claim that such admission by the Railroad Companies (mistaken as it is) could bind the defendants Erichsrud or Woodwick, or affect their standing as bona-fide purchasers—or drive them out and away from the protection of the Statute.

The further claim that because of certain covenants of warranty found in the conveyances to Erichsrud and Woodwick, the money value of which does not appear this Court should override the well established rules governing an equity action applicable to parties, who have dealt with titles obtained from the Government of the United States, as have the parties here—and wrest from them, titles thus acquired, for the benefit of one who has shown no equities in himself—and remit them to their covenants of doubtful value at least, for redress; should find no favor here.

DONOVAN'S POSSESSION PRIOR TO 1885.

What sort of possession did Donovan have to this land and under what claim or right?

It is evident that whatever possession he had of the land in 35 was merely an annex to his possission under his actual entry of the piece in 26. No claim is made that he ever caused a filing of any kind to be made upon it upon the record. The most that can be said is that when at the Land Office he was told that he could not take it, that it was Railroad land, he then acquiesced in that statement, and his paper, whatever it was, was torn up and destroyed, and in the language of witness Bullis, was considered as no application; it was a mere bluff any way, it had performed its duty as a scare-crow and was voluntarily destroyed, and a legal application made for the piece in 26, which tract he actually did take and enter.

In the matter of actual visible possession he testifies that he built his house on 26, ignoring the building spot selected by Barclay in 35. His improvement was mainly done on 26, and in fact nothing was done on 35 until the year 1868, at or about the time he went to file his application on 26, in June of that year, after the entry of Barclay had been cancelled, according to his statement, and after he had been informed of the status of 35; he was then actually living on 26, although using some of the land in 35. As characterizing his possession in 35 I wish to call attention to a statement made by him in his evidence (R. 69, top,) in answer to question in chief as to how the balance of the eighty in 35 was used, he answered:

> "I had not pasture enough, so I cut hay and pas-
> "tured my cattle upon it."

A strange answer to make if he was claiming the eighty as his, to apologize for the trespass, because he hadn't pasture enough of his own, on his homestead in 26. Such a statement is entirely consistent with his possession as a trespasser on this *Railroad* land, but inconsistent with his present claim.

Now up to 1885 what would an intended purchaser of this land have ascertained as to the title or ownership on the *ground and on the record.*

1. He would have found a clear title on the record in the Southern Minnesota Railway Company.

2. He would have found Donovan living on section 26 under a patent from the government as a homesteader, and also found him occasionally using a part of section 35 by cropping, pasturing and haying thereon, after the fashion and custom of other settlers of that day, in that neighborhood, who were thus unlawfully using vacant lands, according to testimony of witnesses Silliman and Woodwick, and as a trespasser and nothing more.

Now what would an intending purchaser of this land have ascertained from inquiry if he had found Donovan in such possession as he claims he was, not actually residing upon it, but using it as he claims he did. He would have learned from him, if asked, that this was a piece of Government land that he was trying to hold as an additional homestead under the act of 1879; that he had made application for it in 1883, and his papers were then on file at the Land Department. *No other claim had been made up to that time.*

Such information would have given him no notice of any defect in the title conveyed by the Government to the State of Minnesota.

This view is deduced from the acts of Donovan in applying for this land, in 1883, as an additional homestead, under the plea that it was Government land, R. p. 194, and also from the allegations of his complaint in his action against Thompson, "That the same was Public Lands of the United States." His claim was that it was Public Land all the time and nothing more. R. 180.

So we find up to the year A. D. 1885, and during all of the time he now claims to have been in possession, there would not and could not have been any information or facts revealed to an inquirer that could have served, if true, to defeat a title taken from the legal owner of the same.

Titles to Public Land can not be acquired by merely squatting upon it. Some actual notice must be given to the world through the *legal channels of the Land Department* within the periods and in the mode and manner limited and provided by law.

K. P. Co. vs. Dunmeyer, 113 U. S. 629, L. C. P. C., Ed. 28-1122.

Donovan took his chances of the R. R. Co. forfeiting its rights to this land in such occupancy as he made of it, but the Company did not fail but it earned the land and received the title from the United States.

It was only after the decision in the Dunmeyer case (which decision opened a field for adventurers and supplanters,) that we find Donovan making any sort of claim to this land, and then only claimed it to be "Public Lands, evidently because of the former Barclay entry, and not until the passage of the act of 1887, do find him asserting any claim to have been injured in his rights by any refusal to permit his entry as is claimed in this suit.

CONDITIONS SUBSEQUENT TO 1885.

ABANDONMENT BY DONOVAN OF POSSESSION.

But neither the defendants, Erichsrud or Woodwick, are chargeable with notice by any visible or actual possession of this tract by Donovan, because by his own evidence as well as that of Woodwick and Hagen, there was *no possession* whatever by him after A. D. 1885, at the time he began his suit with Thompson. See evidence of Donovan, R. 170-171, where he testifies that he *gave up possession to Thompson* in 1885, without force or legal eviction. Simply said that Thompson was "boozing, drinking, and I did not like his appearance. I did not want to get

into any trouble, so I sued him to see if I could get him out." That was nearly two years before the suit was decided and was all the eviction so frequently spoken of in this case of Donovan by Thompson. It amounted simply to a voluntary yielding of such possession as he had to Thompson, and as Donovan says in another part of his testimony that *"Thompson bought the land and of course I was dispossessed and had to give it up, and he took possession."* R. 70.

Donovan has not been in possession under any sort of claim since that surrender to Thompson in 1885, except that he claims that he pastured some and dug a ditch after Thompson took posession. This presumably by Thompson's consent. So at the date that O. C. Erichsrud took possession under his assignment from Thompson of the contract and later under his deed from the Southern Minnesota Railway Company in the year 1888, no one has been in possession but Thompson and these defendants.

The evidence is clear that no one but the Erichsrud heirs were in possession of this land at the time it was sold to Woodwick. The evidence of Hagen, administrator of the estate of O. C. Erichsrud, R. 134, of Brown, R. 139, of Anna Erichsrud, R. 140, of Ross, R. 160, all corroborate this fact of the peaceable and quiet possession of the Erichsrud heirs at the time of its sale to Woodwick.

Woodwick's own testimony clinches the nail on the head, so to speak, as to his want of notice or knowledge of any actual facts anterior to the service of the subpoena on him in 1901 of any dispute as to the title. R. 152, et seq.

In fact the case is clear as to the absence of notice or knowledge of any kind brought home or chargeable to either of these defendants of any claim of right by any one or of any fact subsequent to, or independent of, the certification or patent, of any defect in the title of the railroad company or any of the grantees of this land, prior to the service of the subpoena on them.

In this respect this case is easily distinguished from the second W. & St. P. case relied upon by the plaintiff;

in the court below and may be here, in that case, the claimant Marshall was in possession, and had been for twenty years under a *recorded claim of title*, and was in actual possession when the action was brought by the purchasers from the railroad company to eject him, his preemption filing was made *prior* to the land grant, and *had never been cancelled*, the Court held, that under such circumstances, the purchase by the land company was not in good faith. But in this case there is *no recorded title* of any kind to aid Donovan, and no possession by the claimant Donovan at any time, when these defendants became interested in the land, by purchase, and no notice of any kind, constructive or otherwise, brought home or chargeable to them or either of them, of any defect in the title.

So on this proposition we insist: These defendants are protected and their title as purchasers in good faith is confirmed by the act of March 2nd, 1896, as well as by every principle of equity and good conscience.

And neither the learned Judge of the Circuit Court, nor the full bench of C. C. A. 8th Circuit committed error of commission or omission in holding that the defendant, Woodwick, was a purchaser in good faith.

DONOVAN'S CLAIMED VESTED RIGHTS.

But it is urged by the plaintiff that notwithstanding the good faith of the defendants and the decisions of the Courts confirming titles in such purchasers, where technically the certification was erroneous because of a prior entry at date of the grant, that it was not in the power of Congress by the act of March 2nd, 1896, to confirm this title, because of the claim of vested right of Donovan under the Homestead Law.

In Frisbie vs. Whitney, 9 Wall, 187, 76 U. S. L. C. P. Ed. XIX, 668, and Yosemite Valley Case, 15 Wall, 77, 82, U. S. L. C. P. Ed. XXI, 82, it is held:

"That a party by mere settlement upon public lands "with intention to obtain title to same under the "pre-emption laws, did not thereby acquire such "vested interest in the premises as to deprive Con- "gress of the power to dispose of the property, that "nothwithstanding the settlement Congress could "reserve the lands from sale. . . . That "such settlement, even if accompanied by improve- "ment, did not confer upon the settler any right "in the land as against the U. S., or impair in any "respect the right of Congress to dispose of the land "in any way it might deem proper; that the power "of regulation and disposition conferred upon Con- "gress by the Constitution, only ceased, when all "the preliminary acts prescribed by law for the "acquisition of the title, including the *payment of "the price of the land*, had been performed by the "settler. When these pre-requisites had been com- "plied with, the settler for the first time acquired "a vested interest in the premises of which he could "not be subsequently deprived. He was then en- "titled to a certificate of entry from the local Land "Offices, and ultimately to a patent from the U. S."

Therefore the force of the claim made as to vested right will depend upon a question of fact, to-wit: Has the defendant Donovan shown by the proofs in this case that he had complied with all of the requirements of the Land Laws up to and including the payment of the required fees and price of the land so as to entitle him to a certificate of entry which would ultimate in a patent of the United States?

I have shown heretofore in this brief, that the proofs fall far short of that end.

The case of Donovan depends principally on his own unaided oath as to his compliance with the Land Laws. Mr. Bullis, the ex-Register of the Land Office, who appears as Donovan's witness, fails to corroborate him upon the essential features of the case, but on the contrary contradicts him upon the most essential feature, to-wit: The

filing or offering a formal application for the initiating of a Homestead entry upon the land involved.

He (Bullis) calls the paper under consideration *a mere bluff made to head off some one else, and when it had served its purpose it was destroyed, and was considered as no application, and that then afterwards Donovan made an application for the eighty in 26*, did not amend the old one, so-called, or have it preserved as evidence of his actions, *but it was thrown away*, destroyed as waste paper by *being thrown on the floor,as was done by all such papers, as Bullis testified, R.* 56-57, and in fact upon all of the points necessary to establish that in June, 1868, Donovan made a *bona-fide, persistent attempt to file a Homestead entry on this tract in 35*, but was thereto prevented by the erroneous rulings of the Land Officer, Bullis, there is absoluttely no evidence worthy of consideration. No ruling was made, no application was presented calling for a ruling. It is absurd, to say the least of it, the attempt to dignify that transaction as a bona-fide, persistent attempt by Donovan to file and initiate thereby a Homestead entry on this involved land.

The only attempt at an orderly legal application and initiation of a Homestead entry to this land by Donovan is his application to enter it as an additional Homestead to his entry on 26, in A. D. 1883, and the method of procedure there had, is strong confirmatory evidence of the evidence of Mr. Bullis, to the effect that his effort in 1868 wah actually abandoned, and as Bullis testified, was considered as *no application at all.* [1]

That was the decision of the Commissioner of the Gen. Land Office, Mr. Stockslager, R. 118-119, and seems to be better law and common sense than the decision of Mr. Secretary Noble over-ruling the same.

Mr. Stockslager held upon the meager proofs offered to him, to-wit: the petition of Donovan (not here) and the affidavits, R. 88, a. b. c. that Donovan abandoned at that time, and waived his right to enter the tract in 35, by his own showing, and now after a lapse of thirty-three years and the opportunity of cross-examination of the wit-

nesses afforded by the trial hereof, such an actual abandonment and waiver of his right (if it existed) abundantly appears.

It will be seen that during all of the years from 1868 down to 1888 when the affidavits were made, R. 88 a, no mention is made by Donovan, whenever he speaks of this land, of any claim to have made a homestead application entry in 1868, but he always speaks of it as public land. See his complaint in the Thompson case, R. 180, wherein he alleegs *"That said land is public land of the United States;"* also his affidavit made on his application to enter it as an additional Homestead in 1883 where he swears "That he has resided upon and cultivated the same as an additional to his final entry No. 3,568 for E½, S. W¼. 26, 101, 28." R. 194.

Note the orderly manner that this 1883 application wast treated; it was *not thrown on the floor*, it was *not desroyed*, it was *not considered as no application at all*, but was cerefully preserved, filed, and its rejection orderly and noted on the same. R. 195.

It would appear from this that there is at least a suspicion of collusion between the ex-Register of the Land Office, who has testified here, and claimant Donovan, in this unholy attempt to wrest this land from the rightful owner, Defendant Woodwick.

A careful consideration of the evidence of the acts of Donovan after being told, as he claims he was, that the 80 in 35 was Railroad Land, and was withdrawn from market, in abandoning any attempt to enter the same, in proceeding to enter and occupying the 80 in 26, placing his dwelling and improvements thereon, and in 1883, nearly 20 years afterwards, treating and claiming it as public lands, applying for it as additional homestead, declaring in his affidavit therefor that he has resided upon it, as an *additional to his former entry;* and again in 1885 when his additional application had been repected because of the certification here complained of and pending an appeal thereon, with full knowledge of the railway company's claim after having been informed of its sale to

Thompson, voluntarily surrendering what possession he had of it, to Thompson, the purchaser from the ocmpany; afterwards in 1885 bringing an action in the Courts of the State of Minnesota under the Statute of said State relating to adverse claimants to *public lands*, asserting in his complaint that the land was *public lands of the United States open to settlement*, thereby serving notice on Thompson and all who came after him in title that his claim was that it *was public lands* and *not his homestead*, and then after the action was determined against him, acquiescing in the decision, paying the costs thereof, surrendering and abandoning any further claim to its possession, or claim of any kind to it, afterwards applying to the widow of the deceased defendant Erichsrud to purchase the same from her, all completely and effectually *discredit* his claim to have settled upon and occupied said land by virtue of his so-called application to enter the same in 1868 as a Homestead; the claimed rejection of which application is here alleged, as the base of this action, and yet upon reading his evidence we are led to belive that he had been supplied with every decision of the Supreme Court concerning erroneous certifications, and the essential matters to show the same from the Dunmeyer case in 1884 down to the 2nd W. & St. P. case, and even down to date, and attempted under the lead of his skillful counsel—the special counsel for the U. S. to fit and make his statements to conform to every phase of all the decisions ever made upon the subject.

Now upon his own *unaided, uncorroborated oath*, upon all the material points and in face of all these facts and of his acts, this man Donovan asks to upset and destroy an adjudication of the Land Department of this Government, made over 30 years ago, certifying this land to the State of Minnesota, for the benefit of the Southern Minnesota Railroad Company, after said company had earned it under the act of congress granting the same by building a railroad across the state.

To justify this Court in reaching the result prayed for by the complainant and Donovan, under the circumstances of this case, after the lapse of time here shown, even if the controversy was between the Government and Donovan and the original S. M. *Railroad* Company—without the fact of the equities of these defendants appearing for consideration, the proofs should be so clear and satisfactory as to amount in fact, to an absolute, undisputed certainty. No doubtful evidence should suffice. Courts do not overturn Decrees and Land Titles upon disputed, doubtful evidence.

Maxwell Land Grant case 121, U. S. 325, L. C. P. Ed. 30, 949. U. S. San Jacinto Tin Co., 125 U. S. 273. *Supra.*

And so I ask is it possible that the unaided oath of a man in his own interest can serve and be sufficient to uproot, destroy, vacate and annul the solemn adjudication of the Interior Department of this Government in a matter of which it had full purisdiction, and in which the records were clear and clean of dispute, and thus destroy property and private rights, based and bottomed upon a firm reliance upon the integrity and legality of that action?

It would not be fair, and if unfair, inequitable and unjust. Property and private rights, based upon the integrity of the actions of a Sovereign Government, are too sacred to be set aside in that manner and by such a means.

Any determination of this action, other than affirmance of the Decree appealed from would work an injury to these defendants which this Court under the evidence herein will not inflict. Not only would it cause a loss of property, but would have a tendecy to weaken that regard for the stability of our laws, and the protection which the law casts around its every citizen, and his every legal right, which all good citizens entertain.

It is therefore submitted that upon the whole Record, the Circuit Court of Appeals committed no error, either affirmative or negative, in its judgment and decree affirming the Decree of the Circuit Court Dismissing the Bill herein on the merits, and the same should be affirmed.

ANDREW C. DUNN.

Solicitor for Defendants, Anna Erichsrud, Addie J. Erichsrud, Mabel H. Anderson, nee Erichsrud. Julia P. Remington, nee Erichsrud, and Louis K. Woodwick.—Appellees.